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IN THE

SUPREME COURT

OF OHIO.

DECEMBER TERM, 1868.

THE STATE OF OHIO, ON THE RELATION OF THE ATTORNEY GENERAL

against

THE CINCINNATI GAS LIGHT AND COKE COMPANY.

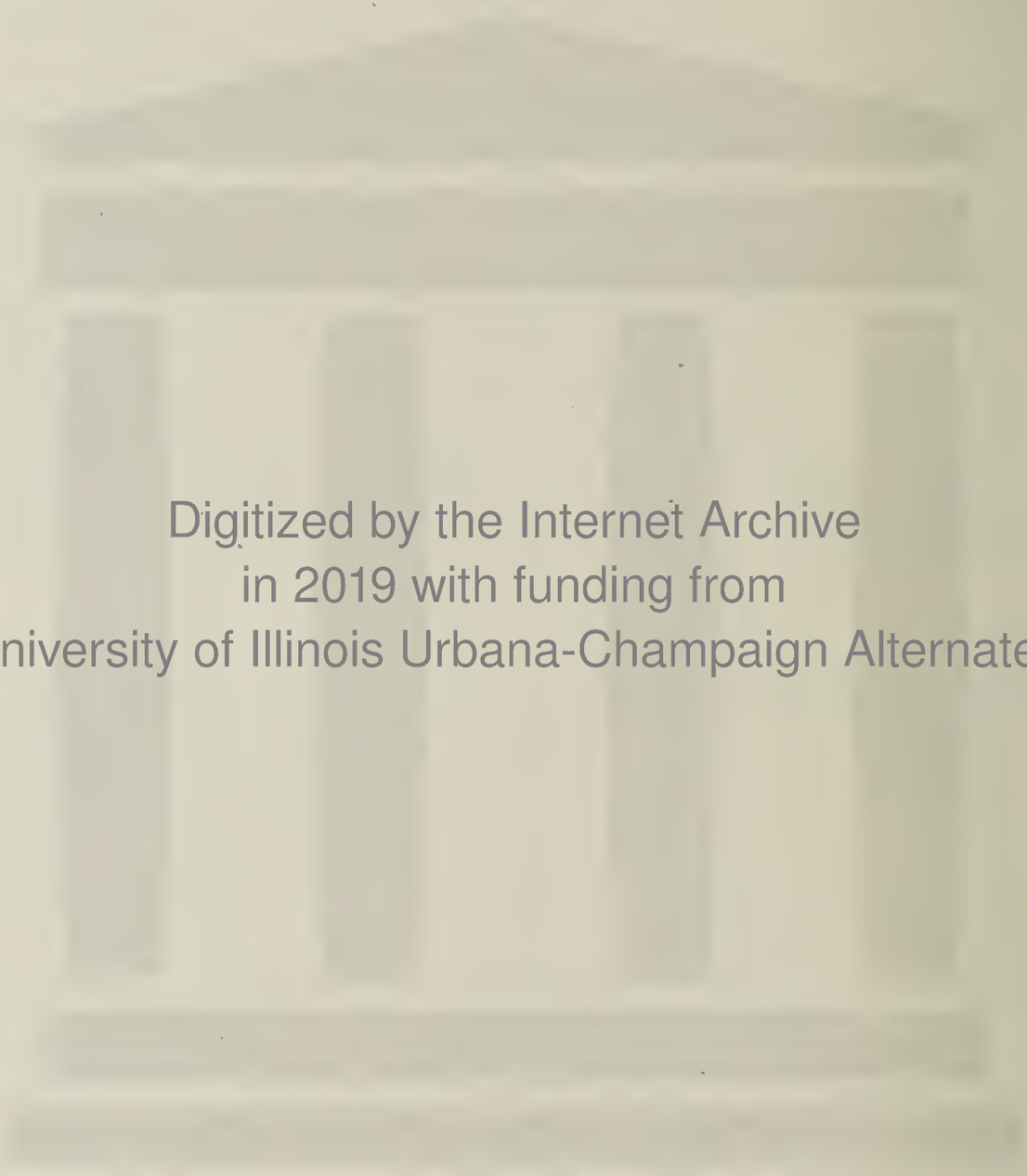
E. A. FERGUSON'S ARGUMENT

FOR

The Defendant.

ROBERT CLARKE & CO., PRINTERS, 65 WEST FOURTH ST., CIN., O.

1869.



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Robert Clarke & Co., Printers, 65 West Fourth Street, Cincinnati, O.

IN THE

Supreme Court of Ohio,

DECEMBER TERM, 1868.

THE STATE OF OHIO, *ex rel.*
THE ATTORNEY GENERAL,
against
THE CINCINNATI GAS LIGHT AND COKE COMPANY.

Information in the nature of a Quo Warranto.

STATEMENT OF PLEADINGS.

THE information filed at the December Term, 1867, charges that the defendant, without any warrant, usurps the following franchises:

1. That of being a body corporate.

2. That of having and exercising *an exclusive* right to open and use the streets of the city of Cincinnati for the introduction of pipes for conveying gas to the city and citizens thereof.

3. That of conveying gas through said pipes, and supplying the same to the city and citizens, and charging therefor at the rate of $2.50 for each thousand cubic feet to each consumer of the same.

The pleadings, so far as it is necessary to state them, in order to understand the following argument, were as follows:

The first plea of the defendant states that, by an act of the General Assembly of Ohio, passed April 3, 1837, certain persons therein named and their associates were *thereby created* a body corporate and politic, with perpetual succession, by the name and style of "The Cincinnati Gas Light and Coke Company," with full power and authority to *manufacture* and *sell* gas to be used for the purpose of lighting the city of Cincinnati, or the streets thereof, or the houses therein contained; to erect works and apparatus, and lay pipes for the purpose of conducting the gas in the streets of said city; but before digging up the said streets, the consent of the *Council* of said city, for that purpose, was to be obtained.

That, on the 16th day of June, 1841, the said city made a contract with James F. Conover, granting to him, his associates, their heirs, assigns and successors, the *full* and *exclusive* privilege of using the streets of the said city for the purpose of conveying gas to the city and citizens thereof, for the term of twenty-five years from the date of the contract, and *thereafter* until the same should be purchased by the city as therein provided, and also granting the *full* and *exclusive* power and authority to open and use said streets for the introduction of pipes for gas. That in the consideration of the said privileges, said Conover, for himself, etc., agreed to furnish to the said city on the streets where pipes should be laid for supplying citizens with gas, *such quantities of gas* as might be required by the City Council for public lamps, at two-thirds of the lowest average price at which gas should or might be furnished to private individuals, in the cities of New Orleans, Baltimore, New

York, Louisville and Pittsburg; *and for the like price* to provide gas for lamps at the engine houses or *other public buildings* or bridges belonging to the city. That said Conover, etc., should have laid within two years six thousand feet of leading pipe for gas, and should annually lay four thousand feet more until the principal parts of the city should be furnished with pipes; and that after the expiration of the said twenty-five years, the said City Council should have the right and privilege of purchasing the works at a fair price and compensation, which should be ascertained and determined by five *disinterested* persons, two to be selected by the City Council, two by Conover or his assigns, and the fifth by the four thus selected. That after this contract, Conover associated with himself James H. Caldwell, and assigned one-half of his rights and privileges to him. That afterward, on the fifth day of September, 1842, Conover and Caldwell assigned the contract, and all the privileges of lighting said city, and using the streets thereof for the purpose mentioned in the contract to the defendant *so incorporated as aforesaid*, which was consented to by the said City Council on the 14th of September, 1842, by a resolution passed for that purpose, subject, however, to the terms and conditions in the contract specified, from which time the defendant had in all respects done and performed the things which were required to be done and performed under it by said Conover.

The *second* plea is the same as the first, with the additional averment that, by virtue of the charter, the contract and the law of the land, the defendant, "for all the time in said information in that behalf mentioned, *and for twenty years continuously prior to the filing of the same*, have used and exercised the liberties, privileges and franchises," as stated in the first plea.

The plaintiff filed *three* replications to the *first* and *second* pleas. The *first* is, that "neither the Cincinnati Gas Light and Coke Company nor the persons acting under such name and style, are the persons named in said act of the General Assembly,

nor their associates, nor the successors of such persons, or of their associates," with a conclusion to the country.

To this replication there was a general demurrer by the defendant, on the ground that it is a departure in pleading. The *second* replication was, that the defendant during the time mentioned in the information, nor at any time, did not have *or* exercise an *exclusive* right to open and use the streets for conveying gas to the said city and citizens thereof, as alleged in said pleas, or otherwise, with a conclusion to the country.

To this replication there was a *special* demrurer, because it does not aver that any person or corporation other than this defendant did, during the time mentioned in the information, have or exercise any right to open and use the streets, &c.

The *third* replication was as follows;

"And the said William H. West, Attorney General, for a further replication in this behalf, saith that true it is that the Cincinnati Gas Light and Coke Company did charge as the price of gas supplied and furnished to the *citizens* of said city of Cincinnati at the rate of two dollars and fifty cents for every thousand cubic feet thereof, as alleged in said pleas, but the said Attorney General further saith that the said General Assembly, by an act passed on the 5th day of April, 1854, provided "That after the passage of this act, it shall be lawful for the City Council of any city in which a gas company has been or may be hereafter established, to fix from time to time, by ordinance, the *minimum* price at which such council shall require such company to furnish gas to the citizens or *public buildings* of such city, or for the purpose of lighting the alleys and public grounds thereof, for any period not exceeding ten years; and from and after the assent of said company to such ordinance, *by a written acceptance thereof*, filed in the Clerk's office of such city, it shall not be lawful for said City Council to require the said company to furnish gas to the citizens, public buildings, public grounds, or public lamps of such city *at a less*

price during the period agreed on, not exceeding ten years as aforesaid: provided that this act shall not operate to impair or affect any contract hereafter made between any city and gas light, or gas light and coke company." And that the City Council of the city of Cincinnati, on the 16th day of August, 1867, by an ordinance, duly passed, provided, "That for the period of one year from and after the first day of September, A. D. 1867, the Cincinnati Gas Light and Coke Company shall furnish gas of the standard quality to the *public buildings* of the city of Cincinnati and to *citizens* or *private consumers* at the rate of two dollars for each one thousand feet so furnished, and shall not charge *any greater sum* than that herein specified; provided, however, nothing herein is to be so construed as a waiver by the city of *her right* to obtain possession of the works of said company, as provided *by contract* therewith." And this he is ready to verify, and therefore prays judgment, &c.

To this replication the defendant filed four rejoinders.

The *second* was, that the defendant has not assented to or accepted the said ordinance.

The *fourth* was, that in September, 1858, the prosecuting attorney of Hamilton county, upon the relation of Samuel M. Hart, filed an information in the nature of a *quo warranto*, in the name of the state against the defendant, in the District Court for said county, whereby the court was informed of the corporate organization of the defendant: that it was provided in its charter that any future legislature might alter, modify or repeal the same; that the legislature, by an act passed March 11th, 1853, so altered said charter that the said City Council was empowered to regulate by ordinance the price which the defendant might charge for gas furnished to the *citizens*, *public buildings*, and streets of said city, and that if it charged more it should forfeit its rights under said charter. That in pursuance of said act, the said City Council, on the 31st of August, 1853, passed an ordinance by which the price for gas furnished *citizens*

and *public buildings* was fixed at $2.25 per thousand cubic feet; that the defendant wholly disregarded the requirements of said ordinance and exacted $2.50 per thousand cubic feet from said citizens and other consumers of gas; wherefore judgment was demanded that the defendant be excluded from all corporate rights and be dissolved. That in October, 1858, the defendant pleaded several pleas, the first of which was in substance the same as the first in this case pleaded, setting forth the charter, the contract and its assignment, by virtue of which, it was claimed, the defendant became invested with the *exclusive* privilege of lighting the city of Cincinnati with gas, and of furnishing the city and citizens of Cincinnati with gas for the period of twenty-five years upon the terms set forth in the contract, which contract, it was claimed, could not be altered, modified, or in any manner changed, by any legislation of the state of Ohio, or by any ordinance of the city of Cincinnati. That in May, 1859, the state filed its demurrer to said plea, because the same was not sufficient in law to bar the state. That at the May term, 1859, of said District Court judgment was entered, finding said plea valid in law, and that the facts therein set forth were a bar to the relief sought by the plaintiff in the information, and dismissing the same. And the defendant avers in said *fourth rejoinder* that said judgment was in full force and unreversed, and prays judgment whether the state ought to be admitted or received against said judgment to plead the *third* replication.

To all of the rejoinders there was a general demurrer on behalf of the state.

The case was argued orally on January 5th, 6th and 7th, 1869, by Messrs. W. Y. Gholson and Stanley Matthews for the Attorney General, and Messrs. Geo. Hoadly and E. A. Ferguson for the defendant. There was also a printed argument by A. F. Perry, Esq., submitted on behalf of the defendant.

ARGUMENT OF MR. E. A. FERGUSON.

May it Please Your Honors,

After the elaborate argument of our learned opponent, Judge Gholson, and the equally elaborate argument by my colleague, Judge Hoadly, I feel that I would be trespassing upon the patience of the court, and taking up unnecessary time if I attempted to go into the preliminary questions arising upon the pleadings. I shall, therefore, may it please your Honors, pass them by, and come to what are the main and principal questions in this case; and the first thing in order that I shall take up and discuss is the nature and validity of the Conover contract.

The Court, in considering this question, will take the contract as they find it upon the record. In the course of my argument I shall make use of the brief presented by the defendants. It contains an abstract of the pleadings which your Honors have in full.

It is, as stated in the record, " that on the 16th of June, 1841, the said city made a contract with James F. Conover, granting to him, his associates, their heirs, assigns and successors, the full and exclusive privilege of using the streets of said city for the purpose of conveying gas to the city and citizens thereof, for the term of twenty-five years from the date of the contract, and *thereafter*, until the same shall be purchased by the said city, as therein provided; and also granting the full and exclusive power and authority to open and use the streets for the purpose of conveying gas."

Now this was the grant made to Conover, " and in consideration of said privilege, the said Conover agreed to furnish to said city, where pipes should be laid for supplying citizens with gas, *such quantities of gas* as might be required by the city

for public lamps, at two-thirds of the lowest average price at which gas is furnished to private individuals in the cities of New Orleans, Baltimore, New York, Louisville and Pittsburg, *and for the like price* to provide gas for lamps at the engine houses or *other public buildings*, or bridges belonging to the city; that said Conover should have laid, within two years from the date of the contract, 6,000 feet of leading pipe for gas, and should annually lay 4,000 feet of leading pipe until the principal parts of the city were furnished with pipes; and that after the expiration of said twenty-five years, the said city council should have the right and privilege of purchasing from the said Conover, his associates, their heirs, assigns or successors, their pipes, buildings, fixtures, and other apparatus, at a fair price and compensation, which should be ascertained by five *disinterested* persons, two of whom should be selected by the city council, and two by the said Conover, his associates, their heirs, assigns or successors, and the fifth by the four thus selected."

There is no question in this case, if your Honors please, as to the *bona fide* character or honesty of this contract. The first question that arises is, were the parties who made the contract competent to contract? About Mr. Conover's ability, of course there can be no question, he being a natural person. He, likewise, as a natural individual, had power to erect gas works in the city of Cincinnati, and he had power to engage in the manufacture of gas in those works. And what was it, now, that James F. Conover, having these natural powers, and, we will suppose, possessed of the capital, would want? It is possible, the thing being portable, to carry it about, just as any other commodity may be carried in vessels adapted to the purpose; but it is not convenient to do so. It is doubtful whether the commodity could be carried about and be so cheap, or furnished at such a price as to bring it into general use. We will suppose, therefore, that Conover had erected his works;

that he had engaged in the manufacture of gas; that he had the commodity to sell. Now, what would he want?

If he only sought to furnish his immediate neighbors, if he desired to furnish only those who held property adjoining his, by agreeing with them that he might lay mains or pipes through their premises, that object could be accomplished. But he desired to furnish other citizens, and in doing so he must cross the streets of the city in order to get from one square to another, or what is more convenient, he might desire to go along the streets of the city—it is, after all, a question of convenience—and he would seek to get what?—the privilege of doing that, of laying his mains either upon his neighbor's property or upon the property which belongs to the public, as I shall endeavor to show, belongs to the city of Cincinnati; but whether he laid mains upon the property of his neighbor or upon the property of the city, he would acquire the same interest individually, no greater, no less.

He would get that which is a familiar thing in the law; he would get the right to lay his pipes, to enter and to repair them; he would get, in other words, an easement. That is all Conover did. It is a property right; and, therefore, when he sought to bargain with the city of Cincinnati, he sought to acquire a property interest. They gave him, his heirs, assigns and successors the right to lay mains. If it had been confined to individual property there would be no doubt about it. Is there any difference in law because it concerns corporate property? Conover had the right, not only to erect works, but he had the right, likewise, to acquire an easement. All that he would acquire was an easement when his mains were put in.

Let us look at the other party, the city of Cincinnati, and at its property interest; let us see how it stands in law, to see whether it had the property to grant to him, or the *use* of the property to grant to him for the purpose for which he

wanted it. I take it, may it please your Honors, that the city of Cincinnati had, as a city under its charter, under the rights which it had accorded to it, the same as all other similar municipalities in the state, a property interest in the streets of Cincinnati; different from the interest which the public has of transit, the privilege of walking, riding and driving on the highway, a greater and a different interest. This is settled law in the state of Ohio, adjudicated by this court as far back as the Seventh Ohio Reports in the case of Le Clerque against the town of Gallipolis, and as I shall endeavor to show your Honors, in a case presenting the question as fairly as any case could present it, decided by Judge Gholson when on the Superior Bench, recognized as law to this day. But, before I cite any case, allow me to call your Honors' attention to a provision of the charter of the city of Cincinnati, to see what this individual corporate body was at that time; for I say that it had as large powers as any municipality existing in the land, expressly given to it by the terms of the charter of 1834.

The first section, after defining the boundaries and incorporating the inhabitants of the city, reciting the usual powers of suing and being sued, and having a corporate seal, declares it shall be competent to have and enjoy all the rights and immunities, powers and privileges, and be subject to all the duties and obligations incumbent upon and appertaining to a municipal corporation, and for the better ordering and governing of the city, it goes on to appoint certain officers; there is a grant of municipal power unrestricted, and all that follows in the subsequent portions of this charter are either enlargements of this grant, by way of giving it powers, not only of general taxation, but of special taxation, or restriction upon the powers that are thus given. The next section, if your Honors please, declares that the said city of Cincinnati shall be invested with the real and personal property, and all the rights and

privileges, etc., belonging to or vested in the city of Cincinnati before that time.

It has all the real property, and it has all the privileges and rights in the city of Cincinnati, as in the case of the town of Gallipolis, no matter where the fee is. Although the public square of that place was set apart and dedicated before the existence of the town, nevertheless, the court held that no matter where the fee was—whether in state, county or town—the use of that property was in the inhabitants of Gallipolis, and that use could not be interfered with by the legislature; it was the private estate of the town.

Again, if your Honors please, in the case of the city of Cincinnati against Evans (5th Ohio State Reports, page 549), it was decided that the property which the city of Cincinnati has in the streets of the city, can be lost by lapse of time. An individual may get it by taking possession and holding it adversely to the city for twenty years, precisely as individual property may be lost and acquired. It was the very question that was made, I recollect, at the time the suit was brought by Platt Evans.

I was the City Solicitor, and drew the plea setting up that the place where he complained that the injury was done was a public highway; that his building projected into the street, the front of which was taken off, and that what the city did was to abate a nuisance. My successor took the same ground when the case came to this court, and it was settled that that property was like any other property of the city; that by lapse of time, and by his possession, the city had lost the right to it, was a trespasser, and was compelled to pay damages to the plaintiff in the case, Platt Evans.

The case to which I refer, which Judge Gholson decided, is a similar case, and is given in Disney's Reports. I have not the book here, but can state what it was. Your

Honors, however, will recollect that, in the case of Dr. Mighels *vs.* the Commissioners of Hamilton county (7th O. State Reps.), it was decided that the Commissioners of Hamilton county, in erecting a court house and jail, were not a corporation; that they were not liable to respond in damages to Dr. Mighels—although, on account of alleged neglect of the commissioners, he had fallen and fractured his thigh, and had recovered upward of $7000 damages in the Superior Court of Cincinnati—upon the ground that they were the agents of the state, and doing the business of the state in providing the court house and jail.

Now in the erection of the court house and jail it became necessary or convenient to take possession of two of the streets of Cincinnati. The body of the jail is built on a portion of one of them. In this street the city had a sewer, situated south of the present court house. The county commissioners, on taking possession, were about to take up the pavement, to inclose the ground, and they had made no provision for the water which had been accustomed to flow upon that street, Before doing so, however, they had, under the statute providing for the vacation of streets, applied to the Court of Common Pleas and had given due notice, as your Honors will find upon the facts recited in the case, had done every thing that the statute required, and had the judgment of the Court, ordering the vacation of the streets—such a judgment as Judge Gholson held barred every one of the adjacent proprietors, but, as he held also, in that case, although that judgment was conclusive upon them, the city had certain property interests, which were not within the purview of the statutes, different from the interests of the lot owners adjacent to the court house in having the right to pass and repass over the ground occupied by the street; that it had built a pavement there, had a water way there, and had other interests in the street; that it had a

two-fold character in regard to the public streets, in one of which the general public interest is represented, in the other a corporate, or individual interest; that although the commissioners, as the agent of the state, had a duty imposed upon them of providing a court house and jail, and were here seeking to use the street for the public, nevertheless in carrying out that duty neither the county nor the state could take this property without making compensation. And he enjoined the commissioners of Hamilton county from proceeding with their work until they made some arrangement by which the water which had been accustomed to flow in that street was provided for.

Carrying out the same doctrine, may it please your Honors, is the case of *Clark* v. *Fry*, 8th O. S. Rep., p. 594, where it is said in addition to the right of transit which the public has, and in addition to that which the city has, the property owner likewise has the right to build sewers and drains, or to set up a fence while building his house, and that it was no nuisance on his part to enter upon the highway and dig and occupy for these purposes. I say, then, that the city of Cincinnati had this property interest in the streets of Cincinnati, that it had the right to use them for all purposes, to promote the health, safety and convenience of its citizens. It is incidental to the highway, and the property use is in the city. There is no instance, I venture to say, if you look through the statute books from one end to the other, where the state of Ohio has ever attempted to violate this right; on the contrary, in every instance, whenever it is proposed to do anything in the highway, it sends the party desiring to get the right *to the municipality.* Then if Conover had said to the city council that he had erected gas works, that this was a new and useful mode of lighting the city, and that he desired to lay his pipes in the streets, and to get that easement of those who were the owners of it, they had the power to grant it. Now, if your Honors

please, for the very same reason they had a right to exact a consideration for that grant, and in this contract they did exact a consideration. What was it? They said to him: We will give you the exclusive privilege to do this thing: we will grant it to no one else, upon certain conditions. We have public interests to subserve. Lighting the streets by night will lessen the number of policemen that it will be necessary to keep to protect the citizens. If a street is being graded, or a sewer is being built, and the city is well lighted, less care will be needed to guard them, fewer watchmen will be required to keep persons passing on the highway from falling into the pits that may be dug for these purposes. So that the municipality, having these duties and consequent liabilities—without going into the act of 1839—the city council had the right, for a consideration, to exact what they did, so far as furnishing the city with gas was concerned.

And right here I desire to correct what I think is an error on the part of the counsel who formerly gave an opinion to the city council of Cincinnati on this subject. In the twenty-fifth section there is a provision that the city council of Cincinnati, in expending its funds, shall not make any contract involving an outlay of money beyond the current year. This contract involved nothing of the kind. They said to Conover: We will give you this consideration—the exclusive easement in these streets—provided you will agree to furnish us with such quantities of gas as we may need for our municipal purposes. It was a contract by which they could obtain gas, and they could take it or not, as the interests of the city required, because they paid him the consideration by which he bound himself to furnish them, from time to time, with such quantities of gas as they should require. It is not the case, as the learned counsel on the other side seemed to think, that the city was bound to take the gas, or that Conover was not

bound to supply it unless they were bound to take it. The contract on their part was an executed contract—they paid the consideration, and they had to that extent the right to make it.

I will come, after a while, to the purchase of the works, and where they got that power. In the case that was cited by Judge Gholson (in 25 Conn.), is a case referred to of the Attorney General against the Sheffield Gas Company (in 19th Eng. Law and Equity Reps., p. 639), and to this case I invite the careful attention of the Court. The case originated before Vice Chancellor George J. Turner. This case was as follows:

In 1818 there had been, in the city of Sheffield, a gas company incorporated by act of Parliament. Subsequently there was another gas company incorporated, and, by another act of Parliament, this company amalgamated with the former one, the two thus becoming one company. Now the citizens of Sheffield felt as though they had come under a monopoly, so it is said in the report. A public meeting was called in Sheffield, and they proposed to get up a new joint stock company, to be called the Sheffield Gas Consumer's Company. Some two thousand subscribers were obtained, owning ten thousand shares, making a capital of £50,000, being £5 per share. This new company was about to enter upon the streets of Sheffield to dig them up for the purpose of laying pipes, but before doing so they had gone to the Board of Highways and had obtained permission to do so. The old company then filed a bill in chancery, and it came on before Vice Chancellor Turner. In his opinion, which will be found in a note on page 641, he speaks of the right of this plaintiff as being an easement, that is what the old company, the plaintiffs, had in the streets of Sheffield, and they were claiming that there would be an injury to their easement by the other company digging up the streets from time to time as they would do. As it appears from the subsequent report, before they got through

with the litigation the defendants had laid about seventy miles of pipes, and they proposed to lay about one hundred—more extensive even than our Cincinnati works, which have about ninety miles—but the Judge speaks of the plaintiffs as having an easement, and he refuses to interfere by injunction, but suggested in the same connection that possibly it might make a difference if the Attorney General were joined with the plaintiffs and should file an information. Thereupon the Attorney General was applied to and filed an information against the new company in Chancery, joined as a plaintiff, and applied for an injunction upon the ground that this thing was a public nuisance, and it was his business as Attorney General to prevent that. The case then came on before the Lords Justice Turner and Knight Bruce. They disagreed in opinion, but both of them treated the plaintiff's property as an easement, and they called in the Lord Chancellor Cranworth, making a full court, as they say in England. The Court refused, by decree, the injunction, and permitted the new company to go on and lay their mains, upon the ground that it was not a nuisance, or not such an interruption with the use of the streets as amounted to a nuisance, and that they would not, therefore, interfere by an injunction. I might say in this instance that the plaintiff company had the right to enter upon and dig up the streets, but the defendant had no such right. They had nothing except what they got through the board of supervisors of highways. It was said, by the Lord Chancellor, in giving his opinion, after saying that Parliament had authorized this stock company: "Did the Court think that they might go and violate the law by tearing up the pavement? I have two theories on the subject, either of which is satisfactory. Perhaps the legislature thought they would get the consent of the board of highways to use the streets through which the pipes would be laid, and that it might safely be left to them

or, that the legislature did not consider the taking up of the pavement for such a legitimate purpose as this, a nuisance at all." There is a similar case as to what interest the company had, in 2 Rhode Island Rep., p. 15. In that case the Providence Gas Company had a charter similar to the gas company in this case: "The said company having power and authority to open the ground in any part of the streets or alleys for the purpose of laying pipes for conducting gas." The question in this case was whether these pipes were personal chattels, or whether the property was real estate or an easement; and the court decided it was real estate, that it was taxable as such, that they had an easement, that it is real property, and not chattel property, therefore taxable as real property, and it was so taxed under this decision.

Now, may it please your Honors, whatever James F. Conover got, or whatever the gas company got, it was a property interest, as I have already said. In the case of Conover he derived it from the owner, the one that had the right to make the grant, the one in whom was invested the property interest.

Let us for a moment consider the other question. It is not only provided in this contract that they shall furnish the city with such quantity of gas as may be required for the public lamps and the public buildings of the city, but it is also agreed, upon the part of Conover, that he would lay so many feet of pipe every year, and that, after twenty-five years, he would sell his works and his interest under this contract to the city, at an appraisement to be made by disinterested persons, as therein provided. It was a continuing right on the part of the city, after the twenty-five years.

Judge Gholson—You are mistaken in supposing that any part of the contract provided for the lighting of the public buildings.

Mr. Ferguson—I certainly am not mistaken in what is upon the record. We will see. In the contract made with Conover 16th of June, 1841, the record says:

"In consideration of the privileges thereby granted, the said Conover, &c., agreed to furnish to the said city such quantity of gas as might be required by the said city council, for public lamps, at two-thirds of the lowest average price at which gas should or might be furnished to private individuals in the cities of New Orleans, Baltimore, New York, Louisville and Pittsburg, &c.; and for the like price to furnish gas to the engine houses or other public buildings belonging to said city."

It is so also in the plea and in the abstract. In addition to that he agreed that after a certain time he would give up his works and his privileges to the city for a compensation. Were it not for the act of 1839 there might be some question as to whether the city was bound by that contract to buy the works after it had made the election to do so. Suppose it had been that he was to give them up absolutely, and that they were bound to take them at the end of the twenty-five years; without the act of 1839 there might be some question whether he could compel the city to take them then. But the act of 1839 gives the power to make this portion of the contract the general municipal power, enabling the city to provide for the lighting of public buildings, whenever the city council, as a governing body, thought fit to do so. As to that which was cited by Judge Hoadly from the fourteenth section, authorizing the city to put taxes upon the adjoining property, if the Court reads that section through they will find that it gives power to levy taxes upon all species of property for general purposes, including paying damages that might be incurred by insufficient lighting. They had the power of taxation, and a special power of taxation is given, namely, for paving or lighting the

streets; but there is no restriction upon the city council from performing municipal duties, except that they shall not make any contract requiring an outlay of money beyond the current year. The special taxing power upon abutting property is for raising additional revenue to be expended for particular purposes. If the city of Cincinnati, under the general contracting power, entered into a contract with a man to pave a street, and to give him an assessment in payment, why, as the contract is construed by the courts of this state, if it failed to give him a valid legal assessment, it must pay him out of the general funds. Judge Gholson and myself know that, as we have had this doctrine, while solicitors for the city, enforced upon us again and again. We generally defended these cases upon their merits, for there is no doubt about the doctrine. So that this special taxing power, in aid of the general revenues of the city, does not prevent the city from paying money out of the general fund for lighting the public buildings, or for any other municipal duty it may think fit to perform.

Looking at this thing in chronological order, we find upon the statutes that the Cincinnati Gas Light and Coke Company was incorporated in 1837, but we know that the city of Cincinnati was not lighted with gas under that charter. By the act of 1839, the city of Cincinnati became incorporated as a gas company, with power to levy a special assessment on the parts of the city that might be lighted with gas—that is, it enlarged the power of taxation in this way: that, whereas, by the charter of 1834, it could be done only upon the petition of the owners of the abutting property, it could be done now without petition. Beside, the general power was given to cause the city to be lighted, and to provide the means the city council was authorized to borrow $50,000. They were authorized to do more than that; they were empowered to erect gas works, and to pass ordinances to protect them, and to make regula-

tions for the sale of surplus gas. Here is full power and authority to do the things themselves. Here was a corporation instituted by the state itself, clothed with this power. And right here let me notice an error which my friend Judge Gholson has fallen into. He says that the act of 1839 granted the continuing legislative power to regulate the sale of gas. I beg my friend's pardon. It granted the power to make regulations to dispose of light to individuals or corporations, for the benefit of the city, as the owner of gas works. It was not a power to pass ordinances for the benefit of those who bought gas, not to pass regulations for the benefit of individuals and corporations; but a power to make regulations for the making and sale of gas light for the *benefit of the city*, as the owner of the works. It is like the right given in our charter, the right to manufacture and sell gas; it is the right to go into the business of supplying itself with gas and selling the surplus gas to citizens or corporations within its limits. "But," says Judge Gholson, "the city council has power from time to time to pass ordinances for the protection of the gas works." They had a general municipal power to do that before, and they can do it to-day. As an illustration of the power of the city to protect the gas works or any other city property, I might say that if any one came and deposited by their side a large quantity of petroleum, or made a powder magazine near, or put a pile of lumber so high that it would be endangering that part of the city, in case of a fire, there is no doubt as to the power of the city to pass an ordinance to protect the gas works. This is a part of its legislative and municipal duty, and it is only a repetition of the power it had before.

The city of Cincinnati then had power to erect gas works, to make and to sell gas, when Conover said to it: "I propose to enter into the business of manufacturing gas, but I can not do it economically unless I have the easement of laying the

mains in the streets of the city. You have that property interest"—the Court will notice that in the third section of the amended charter of 1839 there is no provision that the city shall enter upon and dig up its streets, and have the power to lay mains, &c. There is no provision in the previous charter for this, because it was not necessary; it owned the property for that purpose; all it wanted was the power to engage in the manufacture of gas. Now, I know it will be said, as it always is said in this class of cases, "Do you mean to say that Cincinnati can sell its property, bargain it away, seeing that it is a trust property?" No. Your Honors will find in the law passed March 11, 1845, that the legislature taking it for granted that the city of Cincinnati had this power of disposing of its property, restrained it.

Before that time it had unlimited power, only restrained, as is recognized in this act, by the nature of the property. It could make no grant which was inconsistent with the use for which it held property, but in furtherance of the uses for which it held it, it had full power and authority, recognized by this act of the legislature, and by the laws of the land, to make any contract. And it made this contract with Conover, and this provision with regard to the purchase, under the power which it had to erect gas works. The principal object of the act of 1839 was not to make the city of Cincinnati a gas company, although that is what it would become in law; but it was to enable it to supply itself. The legislature, knowing very well that in doing that it would have surplus gas, authorized it to do that which a gas company would do. As to all the liabilities connected with property, it was a gas company, and, as it was authorized to go into the trade, it was to have the benefits that might be reaped from it.

Having these property and corporate rights, it entered into this contract with Conover, by which it stipulates to get

possession of his gas works after a period of twenty-five years. It was a valid, binding, legal contract. Is it possible now, when for twenty-eight years this contract has been lived up to by both parties, when there is no claim that Conover and his successors have not performed every stipulation, and the city of Cincinnati has had the benefit of it, is it to be questioned at this day, whether there was power in the city to make it? Courts do not by legal subtlety seek to find reasons why contracts should be set aside, especially when honestly made and there is no fraud, and nothing of the sort is alleged here. This rule is, and I am glad to say, in the Supreme Court of Ohio has always been recognized.

Your Honors will recollect at once that I refer to the case of the Chillicothe Bank, against the city of Chillicothe, in which the city was seeking to get rid of the obligation to pay the money borrowed of the bank, where it was endeavored to be set up that these charter rights must be strictly construed, that we must give corporations no other powers than were granted, or necessarily implied; but, said Judge Hitchcock, when they are seeking to get powers as against the public, when they are trespassing upon other men's rights, that is so, but when it comes to the law of contracts, a different rule is made to apply. When they are seeking to get rid of the obligation of a contract, no such rule is to be applied.

The rule in modern times is well stated by Baron Parke in the case of the *South Yorkshire Railroad Company* v. *The Great Northern Railroad Company.* In that case these two companies had entered into a contract, and one of the companies was seeking to get rid of its obligations because it was said it was *ultra vires*, and it was a very close question. Three of the judges were one way and two the other; Baron Parke delivered the opinion of the majority, the Chief Baron and Baron Martin dissenting. But, as I will show your Honors in

a subsequent case Baron Martin assented to and was satisfied with the principle upon which Baron Parke decided. In the case of *Bateman* v. *The Mayor of Ashton* (3 Hurlstone & Norman, pp. 335-6-7, side paging), he alludes to what Baron Parke —Lord Wensleydale, as he had then become—said: "I think the law on this subject is correctly laid down by Lord Wensleydale in his judgment in the *South Yorkshire Railroad Company* v. *The Great Northern Railway Company* (9th Exch. p. 84), and by Mr. Justice Erle in the *Mayor of Norwich* v. *The Norfolk Railway Company*, E. B. 418 (E. C. L. R. vol. 82)."

It is to the effect that, generally speaking, corporations are bound by their contracts as much as individuals; and where the seal is affixed on the contract made by the corporations in a manner binding upon them, the contract is the contract of the corporation, to be governed by the same rules of law as contracts of private persons. But where the corporation is created by an act of Parliament for particular purposes with special powers, another question arises, and the contract does not bind them, if it appears by the express provisions of the statute creating the corporation, or by necessary and reasonable inferences from its enactment, that the contract was *ultra vires*—that is, that the legislature meant that such a contract should not be made."

The question, Lord Wensleydale says (9th Exch. 85), appears to be this: "Whether it can be reasonably made out from the statute that the contract is *ultra vires*, in other words, forbidden to be entered into." And in another part of his judgment (p. 88), he states that "it not being made out that the act prohibits the contract, it must be enforced." Mr. Justice Erle adopts the same view of the law. Whenever a party seeks to get rid of a contract, the question is, has the party been able to make out that the law prohibits the contract? He says, upon the next page, "The cases in equity which are

cited were cases between the companies and their shareholders, where the question is very different from that between a third person and a company, being a corporation, upon a *bona fide* contract."

Now, I say that is the very doctrine of the Supreme Court of Ohio, laid down as far back as 7th Ohio Rep., by Judge Hitchcock, and affirmed in this Court in the case of *Strauss* v. *The Eagle Insurance Company*, 5th O. S. Rep., 59, decided by Judge Ranney. That is the case where the insurance company had taken a note and discounted it for the purpose of preventing the plaintiff from getting his insurance—the company having it as an offset. The Court held that that was not valid, but they laid down the general principles as laid down in the case in 9 Exch. Rep.

Your Honors will see that it was the intention of the legislature that the city should use the necessary means.

The power granted was to cause the city to be lighted, to make and dispose of gas light, and under that the city council had the power to make the contract with Conover for the purchase of his works, stipulating, in the meantime, for what was the principal thing, gas for the city, just as they should require it and no faster. I take it then, that this was a valid and binding contract, and that it gave to Mr. Conover a property interest. I think the whole trouble in this case has grown up by giving that which is only an easement a new and different name, and calling it a franchise—dignifying it with the name of a franchise.

If your Honors please, in 19th English Law and Equity Reports, neither the Attorney General, nor the learned counsel engaged in that case, nor that eminent jurist, Lord Cranworth, nor the Lord Justices, for a moment believed or said, nor did it seem to enter their minds, that that which the new company

was doing, and for which the attorney general was suing, was the exercise of a franchise.

The plaintiff company had a franchise, if any body had, but they did not speak of it as a franchise. They had express power in the charter to dig up the streets, but they considered it as an easement. Your Honors are aware that a franchise in England is derived from the Crown. Here was a plaintiff company that had become a corporation by act of Parliament, and if ever there was a franchise, the plaintiff company in that case had a franchise. If ever there was a case for finding a remedy—if there ever was a case for an information in the nature of a *quo warranto*, instead of in Chancery—that was the very case. It was not pretended that the joint stock company, which was not a corporation, had any grant or privilege from the Crown or Parliament, and nobody suggested that they were exercising a franchise.

And now I put it to the Court if there is any franchise in the case. Is it not a misconception of the gentlemen? They have called it such. I know Judge Gholson is ready to refer me to our own plea. But we can not, by giving it a name, change its character. We can not make that which is an easement a franchise by calling it such, nor can the Attorney General. He has called it a franchise, and we have pleaded that we have certain liberties, rights, and privileges that are granted by the charter and Conover contract. We have not said what the character of those privileges may be. Certainly we have certain franchises, one of which they are endeavoring to take away—that of being a corporation. But I venture to say, we get nothing else that is a franchise, nor are we estopped, in this proceeding, to question whether this right to lay pipe is a franchise—whether that which the Attorney General is complaining of, is a franchise in law. Assuredly, the power to manufacture and sell gas is no franchise.

What was the case in 2d Strange's Reports? The defendant was carrying passengers across a river—I think, a navigable river—but he was not usurping the franchise of taking toll; he was doing the work of ferrying, and he took passage money; but he did not take it as toll—he took it as hire. And in the case of *Rex* v. *Marsden*, there were two towns near by, one having a market, the other not; and a man having property in the town that had no market, permitted persons to gather just as they did at the market; and they sought an information against him, to know by what warrant he claimed to set up a market. It appeared that all he did was to permit parties to come there and occupy stalls, and that he took stallage from them; and the information was refused.

In the case of a ferry, what is the franchise? A ferry is not granted necessarily on the highway, or to the adjacent land holder; nor does the franchise of a ferry consist in owning the land or having an easement in the land. It consists in the right of taking toll for carrying passengers. As it was one of the king's duties to provide highways, and ferries, and bridges, and markets, no one could set up and do these things without a grant from the Crown. Yet a man might build a free bridge on his own land, and permit parties to pass and repass; but he had no right to set up a bridge, and claim toll, and exercise the right of taking toll. And so, in the railway case Judge Gholson decided in 10th O. S. Rep. What is it that has now become a franchise? The right to operate or run and take toll on a line of railway.

Now, that it may be competent for the legislature of Ohio to make certain businesses franchises (as it is said in 15 Johns. Rep. was done) by an act prohibiting parties, without a grant, from entering into the business, is probable.

The case in 15 Johns. Rep. was this: The Utica Insurance Company engaged in the business of banking, and the

Attorney General attempted to enjoin them from the exercise of the power. But the Chancellor said, "No; your remedy is by information in the nature of a *quo warranto*." When he brought the information, it was said: "This is not a franchise." "That was very true," replied the Court, "until the prohibitory act was passed, which prohibited corporations or associations of individuals from engaging in the business of banking, but that made it a franchise." Justice Spencer, in that case, gives the best definition of a franchise: "It is a privilege or immunity, of a public nature, which can not be legally exercised without legislative grant." He has, immediately preceding this, specified the cases where the king had the prerogative, and that is what he means by "public nature." But my learned friends will say: Here, in the second section of your charter, is a franchise.

This company had power, without any other provision than that contained in the first section, creating it a corporation and authorizing it to make contracts, to acquire property rights. Let us look at the second section. "The corporation hereby created shall have full power to manufacture and sell gas." That is not a franchise. It is a limitation upon the first section, as to the nature of the business in which the company can engage, showing to what it is restricted.

The section incorporates the Cincinnati Gas Light and Coke Company, giving it general powers. The second section must be read as a continuation of the first section. First, giving the company the right to manufacture and sell gas; then giving it the power of acquiring an easement in the streets, for laying pipe, with the consent of the city council; and that is all that there is of it, except that it goes on and restricts it as to the amount of its property. When the city of Cincinnati consented to the assignment of the contract which had made

with Conover, it consented that this company should acquire a property interest in the streets, known in law as an easement

It is said that this is a franchise, like the taking of toll, and that it has been decided that the legislature may restrict the amount of tolls, unless there is something in the grant to prevent it. I beg leave to say that I do not see that we are taking toll. We are not engaged conveying gas for third parties. We are not laying pipes and taking toll for carrying gas. We are not *bound* to sell it, and nobody is bound to buy it. If we were, we would not be selling gas. We would be supplying gas, under regulations made by a superior power. And this is no monopoly.

Gas comes into competition with everything possessing illuminating power. What appears upon this record? That there are, in the city of Cincinnati, but ten thousand gas consumers. Gas is not an absolutely necessary article, when so many substances can be used for illumination—candles, oils of various kinds, and anything that may be discovered hereafter. Why, this very printed record, and this printed brief, now before your Honors, was set up and printed in an establishment, in the very heart of Cincinnati, one of the largest printing establishments in Cincinnati, where the gas, differing in no material respect from that used in this room, is, and has been for the past fifteen years, made in that establishment.

The gas manufacturing apparatus is not much larger than an ordinary stove, the gas being made, I believe, out of sawdust and crude petroleum. Now, we do not claim that there is anything to prevent this person from supplying gas to his neighbors. He might supply that large public hall (the Melodeon) immediately adjoining, or, possibly, those magnificent stores on Fourth street, between Walnut and Vine streets. There is nothing in this contract that prevents an individual, or an association of individuals, living in the same square, from

owning and operating small gas works of their own. There is nothing in this contract preventing parties doing that, if they choose; and there is nothing that binds us to supply them.

Under the circumstances, gas must be considered a luxury rather than a necessary of life; and because it is such, and because the interest of this party, like the interest of any other manufacturing corporation—like the one it is likened to in the 25th Conn., a leather manufacturing company—is to sell its commodity, the state leaves it to that interest as it would any other manufacturer.

This company, then, having the power to acquire this species of property, by the assignment of Conover, with the consent of the city of Cincinnati, acquired this easement; and no alteration or amendment of its charter can take that away or diminish its value. That it is not a franchise is apparent from the proposition that no alteration or amendment to the charter, although the power is reserved, can affect its property rights, or add conditions upon which it can exercise them.

To what Judge Hoadly said in regard to fixing the price of gas, I want to add this consideration. It is a general proposition that a company, like an individual, has the same right to sell and dispose of the property which it has a right to acquire, that an individual has, and that property rights can not be interfered with. And I put this question to my learned friends: If the city of Cincinnati can fix the price at which we shall sell gas that we manufacture, why can not the city of Cincinnati fix the price of coke? Why can it not fix the price of coal tar, the product of the residuum, or that which is used as a fertilizer, the refuse lime, or any other production? There is no difference. We have the right to manufacture and sell gas; it is not said we have the right to sell coke.

If we have a franchise at all, we have a franchise just as

much in selling coke, and coal tar, and the lime, as in selling gas. We have the same property right in each; and why the city of Cincinnati is restricted in the one case, and not in the other, passes my comprehension.

But it seems to me that this whole trouble has grown out of calling the right to lay pipes by a name which does not belong to it—calling it a franchise, when it is nothing but an easement, and endeavoring to tack upon that the right to regulate the price of a commercial commodity, when there is no more reason than there would be in fixing the price of leather manufactured by a company, or fixing the price of coke or coal tar; and if such a right exists by reason of this charter, if it exists in one case, why does it not exist in the other?

We come now to the statutes of 1853 and 1854. The language of the statute of 1853 is broad enough to give to the city of Cincinnati the power to fix the price of gas manufactured by the defendant, because it includes all companies in its general language. But, as Judge Swan says, it is not to be supposed that the legislature intended that it should apply to companies incorporated before, without some special provision in their charter; and the legislature, having discovered that there were cases not covered by the act, made haste to repair the omission; and that is the object of the law of 1854. Hence, the act of 1854 is a supplemental act to that of 1853, and supersedes it as to all property situated like that of the defendant.

Now, if your Honors will permit, I will restate the argument: That the charter gave no power to the legislature of Ohio to delegate its power of amendment or modification. It is a very high power that can change the terms of a contract. Suppose the Mayor, in the act of 1854, had been given the power to fix the price of gas, would that be within the terms of the contract? By the reservation, one of the parties

has the right to modify within certain limits; but it was a reservation personal to the legislature, and not a reservation to the effect that the legislature may delegate to some one else to alter and modify. The reservation is that the legislature shall do it; and your Honors know that in the legislature there is a time appointed for hearing before a body of men selected from all parts of the state.

It is true that under the new constitution, the legisture has no power to confer corporate powers by special act, but it may modify, repeal, or amend; there is no prohibition as to that, just as long as it is acting under the power it has reserved. It shall not enlarge them, but the constitution has not forbidden it to exercise the power it reserved in this case. There is no necessity for its delegation. And there is a contract between the parties that it shall not be delegated, for if they intended that such should be the power they would have expressed it, and if they failed to express it in the contract, it it does not exist.

I am reminded by Judge Hoadly that in none of the cases where legislatures have attempted to exercise this power of amendment under general laws, was there a constitutional provision like that in our constitution in regard to the amendment of acts; but whether there was or not, I submit that here is a body with continued existence able to modify the contract, if there is such a power reserved, by an act directly on the subject matter. There is no defect in the body, and it is to it that is reserved the power to alter or amend, and only by it can it be exercised, for that is what the parties have stipulated and nominated in the bond. If it were a case between individuals there would not be a question about it.

If A. B. and C. D. had agreed that C. D. should have the power to modify a contract in certain particulars, C. D. could not delegate his power to somebody else to do it. It is

personal to him, unless he has reserved the power to delegate the right. This is a contract, say the Supreme Court of the United States, in the Binghamton bridge case, and it is to be construed by the same rules that you construe contracts between individuals. Now, it is time enough to say that this is an amendment to the charter of the Cincinnati Gas Light and Coke company, when the legislature of Ohio, which has reserved the power, has acted upon the subject. But I think it was not intended to be acted upon.

I think it is plain enough when you read the act of 1853, and read the note by so able a lawyer and judge as Judge Swan on that section of the act of 1853, and then read the act of 1854, what the legislature meant by the act of 1854. It took the facts as it found them: that here was a city in the state of Ohio that had entered into a contract with a gas company, by the terms of which it had provided for its own gas, both for the public streets and public buildings, but not for gas supplied to its citizens. Read the act of 1854; it includes both gas supplied to the citizens and gas supplied to the city, and it says as to both: You may pass an ordinance fixing a minimum price which shall be in force for a period of ten years; and when it is accepted by the company you shall not require them to sell gas at a less price, and the acceptance shall be in writing. Now, your Honors may suppose that the period might not be ten years, it might be only one year; and then comes the proviso, provided that this contract shall not interfere with any contract made with the Cincinnati Gas Light and Coke company.

You may inject, as it were, a temporary contract into this, not only as to your own gas, for which you have already agreed, but as to the gas for your private consumers, as to which you have not agreed; and that shall not affect the original contract after the termination of the ordinance. That

is the sum and substance of the law; that is its intention as I read it, and read in that light, it seems to me it is consistent. When the ordinance is agreed to by the company is the time when it becomes binding.

Where would be the necessity of providing that the city council should fix a *minimum* price, if the company had nothing to do with it—a price below which the company could not but above which it might go? If the city council can fix the *maximum* without the consent of the company, that was already provided for in the act of 1853, and the act of 1854 was not needed. There is no act that binds, and there was no intention to bind the company to supply gas at the price fixed, whether it wished to or not. If it see fit to supply it to the citizens for less money, to increase its custom, is there any law to prevent it?

The act of 1854 fixes the *minimum* price. It says, "That after the passage of this law, it shall be lawful for the city council of any city in which a gas company has been, or may be hereafter established, to fix, from time to time, by ordinance, the *minimum* price at which such council shall require such company to furnish gas to the citizens, or public buildings of such city, or for the purpose of lighting the alleys and public grounds thereof, for any period not exceeding ten years, *and from and after the assent of said company to such ordinance*, by a written acceptance thereof, filed in the clerk's office of such city, it shall not be lawful for said city council to require said company to furnish gas to the citizens, public buildings, etc., *at a less price* during the period agreed on, not exceeding ten years, as aforesaid.

Now, the ordinance of the city council, right in the teeth of the act of 1854, and the Conover contract, says that the Cincinnati Gas Light and Coke company shall furnish gas of a standard quality to the public buildings, etc., at the rate of

two dollars per thousand cubic feet, and shall not charge any greater sum. Judge Matthews admits that the Conover contract is a valid contract.

Judge MATTHEWS—I never have done so.

Mr. FERGUSON—Whether Judge Matthews admits it or not, the law, as it stands, will not interfere with the contract between the gas company and the city council.

This ordinance says we must furnish gas to the *public buildings*, and we must at the same price furnish it to private consumers. This is a violation of the contract. It was not intended that the city council should have any such right. The object of the law was to uphold and maintain contracts, and to keep the good faith of the city, and there is nothing in it in conflict with the contract between the parties. No provision was made in the original contract for gas sold to private consumers, but it might be that the parties might wish to modify it on behalf of the citizens. The legislature says, "We will enable the city council to do that. The company has the corporate power to contract on its own behalf, it requires no enabling act; and you may contract on behalf of your citizens; you have no such power now, but we will enable you to do it by the passage of this law of 1854, under which you and the company may agree for a period of ten years."

Now, it seems to me that this is the plain common sense of this case, looked at in the light in which the contract was made, and has been executed and understood by the parties for twenty-eight years. What a strange, inconsistent case this is, looking at the very last provision of this ordinance, "provided, however, that nothing herein is to be construed as a waiver by the city of its right to obtain possession of the works of said company, as provided by contract therewith."

What contract? The contract which my friend, Judge Matthews, proposes to repudiate, at this late day, as in-

valid, and not binding, and as *ultra vires*, beyond the power of the city to make. It may be that the city, like the state, can have inconsistent claims upon the same record. The state of Ohio does, in this case, make inconsistent claims in pleading, first in order, that we are no corporation, and then in charging that we usurp certain privileges as a corporation; and now we have the inconsistency of its being claimed that the contract is valid and invalid at the same time.

I have only to add that I respectfully request a reconsideration of the question whether or not the plea of the judgment in the District Court is not a bar to the exercise of this power. There is no reason, that I can see, why the state should not be barred the same as an individual, as to the question in that case, namely: whether the city of Cincinnati had the right to fix the rate at which gas should be supplied to its citizens.

Thanking the Court for the patience with which they have listened to me, I submit the case.

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